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SECURITY INFORMATION

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5 January 1952

MEMORANDUM FOR THE RECORD

SUBJECT: Letters of Marque

1. Background: Letters of Marque, like letters of reprisal, were originally issued by the sovereign to his subjects when the latter had been oppressed and injured by the subjects of another state and justice was denied by that state to which the oppressor belonged. The letter granted the holding party authority to seize the bodies or goods of the subjects of the state to which the offender belonged. As such the authorizing letters were concerned with private, as distinguished from public reprisals and were rationalized as follows by Vattel:[1]

> "We have observed ... that the wealth of the citizens constitutes a part of the aggregate wealth of a nation, -- that, between state and state, the private property of the members is considered as belonging to the body and is answerable for the debts of that body; whence it follows, that in reprisals we seize the property of the subject just as we would on that of the state or sovereign. Everything that belongs to the nation is subject to reprisals, whenever it can be seized, provided it is not a deposit intrusted to the public faith. (As it is only in consequence of that confidence which the proprietor has placed in our good faith, that we happen to have such deposit in our hands, it ought to be respected, even in case of open war).
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> "... this violent measure approaches very near to an open rupture, and is frequently followed by one, it is, therefore, an affair too serious in nature to be left to the discretion of private individuals. And

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[1] Vattel, Law of Nations, (1883), p. 284.

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accordingly we see, that in every civilized state, a subject who thinks himself injured by a foreign nation, has recourse to his sovereign, in order to obtain permission to make reprisals. This is what the French call applying for Letters of Marque."

These reprisal authorizations are distinct from a specie of later origin -- the public reprisal -- but similar terminology is often used interchangeably. Historically, Letters of Reprisal were also granted in time of war to privateers -- and this authorization has no relation to prior loss on the part of the individual receiving a license.

Generally, public reprisals were used as a means of coercion short of open warfare and are in fact so defined by Hackworth:[2]

"Public reprisals may thus be defined as coercive measures taken by one state against another, without belligerent intent, in order to secure redress for, or to prevent recurrence of, acts or omissions which under international law constitute international delinquency."

This view is found frequently among the writers on the subject[3] but other writers have compounded the confusion by defining the "Letters of Marque" as authorizations granted by one nation at war with another. Thus Wheaton[4] states:

"... the term "Letter of Marque' seems to be confined to the authorization to private armed trading vessels to make captures of property of the enemy in war. If there is no declared or recognized status of war, and the government, for a public purpose, desires to seize property, in the way of security or warning or specific retaliation, such authorization to such vessels would be called 'Letters of Reprisals' or 'Letters of Marque and Reprisal.' If, in

[2] Hackworth, Digest of International Law, Department of State (1941), p. 156.

[3] Vattel, Op. Ct., p. 284, states: "On the subject of reprisals, it is necessary to observe that when we adopt that expedient, as being a gentler mode of proceeding than that of war, the reprisals ought not to be general. The grand pensionary DeWitt very properly remarked: 'I do not see any difference between GENERAL reprisals and open war.'"

[4] Wheaton, Elements of International Law, p. 311.

time of war, the private vessel receiving the authorization is fitted out and employed solely as a cruiser, she is called a privateer."

Historically, it is apparent that Letters of Marque have been issued by one sovereignty at war with another. When the United States attempted to restore civil authority by use of military force, the Confederacy declared war and issued Letters of Marque.[5]

2. Present Legal Status.

The European powers formally renounced (for "all time") Letters of Marque and Reprisal at the Treaty of Paris in 1856 and although the United States Constitution specifically grants Congress the power to issue these letters,[6] Shotwell[7] says:

> "... this right of Congress belongs to an era which has passed away, for it would now be regarded as little else than the sanction of piracy."

There are many references to Letters of Marque in the various neutrality laws of European nations, primarily enacted during the periods of the Crimean War or the American Civil War. The following excerpt from the Netherlands neutrality laws indicates the substance of these acts:

> "... to maintain neutrality ... no cruisers under any flags, commissions, or letters of marque whatever, will be admitted to our seaports, with or without prizes, except in cases of sea-danger, and that, in any case whatever, such cruisers and their prizes will be watched and ordered to sea as soon as possible."[8]

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[5] Wheaton, Ibid, p. 71. The United States did not declare war against the Confederacy, nor did it issue Letters of Marque since it did not recognize the body-politic but rather considered the rebellion as one of individuals.

[6] Art. I., Sec. 8.

[7] Shotwell, James, War as an Instrument of National Policy, Harcourt, Brace & Co., N. Y., 1929, p. 28.

[8] Deak and Jessup, Neutrality Laws, Regulations and Treaties, Carnegie Endowment for International Peace, 1937, p. 813.

Treaties of amity between European states often provided that "the parties will not give Letters of Marque to their subjects, nor to other parties..." (Russia-Sweden, 1801).[9] Presumably, these treaty references were to authorizations for private rather than public reprisals.

China, of course, was not a signatory to the Treaty of Paris, nor have we found any treaty banning or restricting the use of reprisal letters to which she was a participant.

The Covenant of the League of Nations did not forbid reprisals. Hackworth says:[10]

> "They (peaceful means of repression) are not forbidden by any of its articles. I may add that in its Preamble the principles of international law are expressly recognized. Among these principles is the right of peaceful reprisals and of occupation as a means of guarantee. These reprisals are therefore legitimate. It should be noted that such eminent authorities on international law as Professors Schucking and Wehberg ... who have studied in detail the Covenant of the League of Nations, state most explicitly that reprisals and retorsion are not forbidden."

If the Kuominstang government were to issue Letters of Marque against the Chinese Communists as a means of reprisal her committments as a signatory to the United Nations and to the Article 36 of the Statute of the Permanent Court of International Justice would require consideration. Colbert has considered the status of public reprisals in relation to the Charter of the United Nations in some detail and her section on this point is attached as Appendix A. The provisions of Article 36 of the Permanent Court of International Justice are attached as Appendix B.

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[9] Ibid, p. 1436.

[10] Hackworth, Op. Cit., p. 155.

3. Alternative to Historical Confusion.

Chapter I, Article 2(7) of the United Nations Charter provides:

"Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present charter..."

Historically, internal revolt has been a prime example of "matters which are essentially within the domestic jurisdiction of a state." As such the recognized authority may use any means authorized by the laws of war ("the laws of war are applicable, and must be observed, in a civil war as in any other war.")[11] to quash the rebellion. The outfitting and authorizing of privateers to prey on the shipping of belligerents is a traditional device of war. According to international law, a belligerent has an inherent right to capture enemy ships and cargoes.

There is no apparent legal reason (from the standpoint of international law) why the Nationalists could not commission private, armed vessels as privateers to cruise during a recognized war against the commerce of the enemy.

[11] 67 C.J. 347.

PUBLIC REPRISALS AND THE CHARTER OF THE UNITED NATIONS[1]

Article I of the Charter defines as among the purposes of the United Nations "To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace..." Article II binds the members to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered (and to) refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Chapter VI binds the parties to a dispute to seek peaceful means of settlement and provides various means whereby the Security Council may investigate the dispute and facilitate its settlement. Chapter VII provides for the punitive action to be taken by the Security Council "with respect to threats to the peace, breaches of the peace, and acts of aggression."

Self-defense against an armed attack "until the Security Council has taken the measures necessary to maintain international peace and security..." is the only unilateral use of force specifically authorized by the Charter. Logically, therefore, unless it has been directed to take such measures by the Security Council acting under Chapter VII, the individual state loses the right to embark on acts of force short of war on the grounds that a prior illegality has been committed by another state (except in self defense as defined). Thus, in a sense, the right to determine when an illegal action has occurred and to decide on and direct the methods of punishment is transferred from the individual state to the Security Council, which becomes itself the author of reprisals. Under this reasoning the position of the Security Council, in the absence of an international police force, becomes somewhat analogous to that of the ruler who authorized his subject to take private reprisals but regulated the means by which they might be carried out. Such assim-

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[1] Colbert, Evelyn S., Retaliation in International Law, King's Crown Press, N. Y., 1948, p. 202-206.

ilation of retaliation to the provisions of the Charter, moreover, may be of some advantage in strengthening the position of the Security Council with regard to states not actually involved in the action taken in view of the precedents earlier established by the acquiescence of third states in measures undertaken on retaliatory grounds which limited or affected their rights.

Since the provisions of the Charter are by no means entirely clear, however, and since they will have to be interpreted in the light of existing situations and political realities, it is probably premature to assume even that the states signatory to the Charter by accepting it in general have agreed in particular that they no longer possess the right of retaliation. Rather it would seem advisable to examine the Charter to determine what questions regarding peacetime retaliation it leaves unanswered.

It is the aim of the Charter to bring about the peaceful settlement of international disputes or failing this to prevent the unilateral adoption of measures of force. It would be unjust to say, however, that the aim of the Covenant was less comprehensive. As the Corfu Incident has shown, mere paper provisions for settlement will not, in themselves, suffice to eradicate reprisals, if the will to enforce such provisions is absent. The Charter, however, does appear to provide a more satisfactory basis for the handling of a reprisal case than did the Covenant. The latter with its emphasis on war or threats of war made it possible for Italy to erect a legally arguable case upon its essentially political aims. The Charter is concerned less specifically with war and more generally with threats to or breaches of the peace and does, therefore, at least narrow the range within which legalistic obfuscation is possible. Nevertheless there exists gaps in the Charter, as there did in the Covenant, which might make it possible for a state to embark upon retaliatory measures and pursue them unscathed.

With regard to definition of terms, the question arises as to whether a reprisal, ostensibly undertaken for no other purpose than to secure justice which would otherwise be denied, is a use of force "inconsistent with the Purposes of the United Nations" or not "in the common interest." It might indeed be argued in certain cases that the reprisal in question not only served to rectify the wrong done to the retaliating power but also served to advance the purposes of the United Nations.

It would, of course, be for the Security Council, under Chapter VI to call upon the parties to the dispute to settle by peaceful means before the situation developed to a point where the adoption of a

retaliatory policy was threatened. But in order for the Council to take this step there must be unanimity among the permanent members[2] and it is not difficult to envisage a situation in which this unanimity could not be achieved. The same problems apply, of course, to any other of the Security Council functions with regard to international disputes envisaged in Chapter VI: investigation; recommendation of appropriate procedures or methods of adjustment; and recommendation of terms of settlement. The failure of the Council to act under Chapter VI as the result of a veto by a permanent member might eventually lead to a situation in which one party to the dispute would proceed to reprisals against the other. Under these circumstances it would seem very likely that the failure of unanimity under Chapter VI would be repeated when efforts were made to have the Council take action under the much more drastic provisions of Chapter VII.[3]

Should the potentially retaliating power be itself a permanent member of the Council the unanimity requirement would be of less weight in decisions under Chapter VI since, when these decisions are made, parties to a dispute must refrain from voting. Were a permanent member actually to resort to measures of retaliation, however, action under Chapter VII would be barred by the unanimity requirement.

Despite the obvious gaps in the Charter, however, -- and academic anticipation of legal loopholes is generally far outdistanced in actual practice -- the Statute of the International Court of Justice provides a further basis for the subordination of reprisals, as distinct from other unilateral acts of force short of war, to orderly international processes.

As had been pointed out elsewhere in this paper a state embarking upon a retaliatory policy, whatever its motives, must at least pay lip-service to international law by claiming that its actions are a response to a prior violation of that law. This very emphasis on the legal nature of the dispute brings the whole question of peacetime

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[2] Subject always to the exception that in decisions under Chapter VI a party to the dispute may not vote.

[3] In theory the same situation might obtain without the exercise of the great power veto if the five permanent members, having agreed upon a course of action, were unable to secure the support of two non-permanent members. Actual development of such a situation seems unlikely, however.

retaliation much more clearly within the jurisdiction of the International Court of Justice than are other acts of force short of war. States that have made declarations under Article 36 of the Statute of the International Court of Justice[4] have accepted, with various reservations regarding questions of domestic jurisprudence and other matters, the compulsory jurisdiction of the Court "in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation."

Many of the disputes which have given rise to public reprisals in the past have fallen under the relatively specific categories set forth in clauses a, c, and d of Article 36. In addition, the broad terms of clause b coupled with the requirement that for a normally illegal act to be justified on retaliatory grounds it must itself be a response to a prior illegality might well justify the conclusion that as between states party to Article 36, which do not choose to adopt other means of peaceful settlement, most if not all of the disputes of the type which have hitherto given rise to reprisals must be submitted to the International Court. Under such circumstances the occasion for reprisals could not arise unless the offending state failed to carry out the award of the court, an eventuality rendered less likely by the general tendency of states to accept the findings of a court once they have submitted to its jurisdiction. Thus for purposes of limiting as opposed to abolishing peacetime retaliation, as wide an extension as possible of acceptance of the optional clause would at least allow for the judicial determination of the question as to whether grounds for retaliation exist and would probably reduce the occasions on which unilateral acts of force could plausibly be employed on retaliatory grounds.[5] That states which have bound themselves by Article 36 and regard themselves as aggrieved might abandon the retaliatory argument and seek other justification for a unilateral act of force is, of course, all too possible; it is not however, a problem with which this paper is concerned.

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[4] Or under Article 36 of the Statute of the Permanent Court of International Justice.

[5] An excellent example of resort to judicial settlement in a situation resembling many in the past that had led to reprisals is the submission to the International Court of Justice of the dispute between Great Britain and Albania over the sinking of British ships in Corfu Channel in October, 1946.

ARTICLE 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.